(2)

No. 99-664

Supreme Court U.S.
F I L E D
NOV 15 1999
CLERK

IN THE

Supreme Court of the United States

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER and JEANETTE P. NEUFELD,

Petitioners,

v.

U S WEST, INC.; U S WEST MANAGEMENT PENSION PLAN and U S WEST COMMUNICATIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

D. WARD KALLSTROM
Counsel of Record
GREGORY D. WELLONS
LILLICK & CHARLES LLP
Two Embarcadero Center
Suite 2700
San Francisco, CA 94108-2693
(415) 984-8200

DARREN E. NADEL
U S WEST LAW DEPARTMENT
1801 California Street
Suite 5100
Denver, CO 80202
(303) 672-2897

Attorneys for Respondents

156260

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

30pp

QUESTIONS PRESENTED

Respondents describe the questions presented by Petitioners' Petition for Writ of Certiorari (the "Petition") as follows:

Question One

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that back pay and/or front pay are not forms of "appropriate equitable relief" under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) for participants whose lump sum retirement benefits were partially subject to immediate taxation as a result of a breach of fiduciary duty.[1]

---

1. The Ninth Circuit panel, in its 1998 order, reversed the District Court's finding that no fiduciary breach had occurred. The panel made its own factual finding that Respondents had made deliberate misrepresentations, which finding was completely contradictory to an express finding of the District Court. The panel's conclusions on the issues raised by the Petition would be mere *obiter dicta* but for that finding. The panel had no power to set aside the District Court's findings of fact unless it determined that they were unsupported by the record (which was manifestly not the case). *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3109 (U.S. Nov. 1, 1999). Respondents urge this Court not to accept for review the issues raised by Petitioners unless it also grants review of the standard of review applied by the panel to the District Court's finding that there was no breach of fiduciary duty. Accordingly, Respondents are filing simultaneously with this Brief a Conditional Cross-Petition for Writ of Certiorari pursuant to United States Supreme Court Rule 12.5.

Question Two

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that reformation and/or rescission are not forms of "appropriate equitable relief" under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) under the facts of this case.

Question Three

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's application of *Mertens v. Hewitt Assocs.*, 508 U.S. 428 (1993), to plan fiduciaries sued by plan participants for individual relief solely under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)).

Question Four

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that ERISA preempts state law claims of breach of fiduciary duty based on an alleged misrepresentation by plan officials to plan participants in connection with the participants' selection of plan benefits.

STATEMENT PURSUANT TO RULE 29.6

Respondent, U S WEST Communications, Inc., is a wholly owned subsidiary of U S WEST, Inc. Respondent U S WEST, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutes or Other Provisions Involved	1
Statement of the Case	3
A. Introduction	3
B. Statement of Facts	5
1. The Plan and Its Administration	5
C. The Plan's Excess Benefit Provision and Its Administration	6
D. Disclosure of Possibility of Excess Benefit Distributions	7
E. Differences Between Qualified and Excess Benefit Distributions	7

Contents

		Page
F.	The 5+5 Plan Amendment	8
G.	Why the 5+5 Materials Did Not Specifically Address Excess Benefit Issues	8
H.	The EBC's Discovery Of and Action to Remedy the Excess Benefit Problem	10
I.	Notices to Participants About the Excess Benefit Problem	10
J.	Course of Proceedings Below	11
Reasons for Denying the Writ		14
I.	There Is No Conflict Among the Circuits On the Availability of Back and Front Pay as a Remedy for Fiduciary Breach or On the Denial of Such a Remedy on the Facts Presented	14
II.	There Is No Conflict Among the Circuits on the "Reformation" Issue, Which the Ninth Circuit Correctly Decided	16
III.	There Is No Conflict Among the Circuits on the Application of *Mertens* to Alleged Fiduciary Breaches	18
IV.	There Is No Conflict Among the Circuits on the ERISA Preemption Issue	19
Conclusion		21

TABLE OF CITED AUTHORITIES

Page

Cases:

Akers v. Palmer, 71 F.3d 226 (6th Cir. 1995), *cert. denied*, 517 U.S. 1004 (1996) 17

Amato v. Western Union Int'l Inc., 773 F.2d 1402 (2d Cir. 1985) 17

Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 16

Buckley Dement, Inc. v. Travelers Plan Admin., 39 F.3d 784 (7th Cir. 1994) 18

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 17

Hickman v. Tosco Corp., 840 F.2d 564 (8th Cir. 1988) 17

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 17

Izzarelli v. Rexene Prods. Co., 24 F.3d 1506 (5th Cir. 1994) 17

Kearney v. Standard Ins. Co., 175 F.3d 1084 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3109 (U.S. Nov. 1, 1999) ..... i, 13

Cited Authorities

	Page
Lockheed Corp. v. Spink, 517 U.S. 882 (1996)	17
Malia v. General Elec. Co., 23 F.3d 828 (3d Cir. 1994), *cert. denied*, 513 U.S. 956 (1994)	17
McLeod v. Oregon Lithoprint, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997)	18
Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) ..ii, 13, 18	
Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)	17
Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 77 (1995)	14, 15
Slice v. Sons of Norway, 34 F.3d 630 (8th Cir. 1994)	18
Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984)	17
Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196 (1st Cir. 1997)	18
United Independent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1274 (7th Cir. 1985) ..	17
Varity Corp. v. Howe, 516 U.S. 489 (1996) ...12, 19, 20	
Waller v. Blue Cross, 32 F.3d 1337 (9th Cir. 1994)	17

Cited Authorities

Page

Statutes:

26 U.S.C. § 401(a) 5

26 U.S.C. § 415 ..... 5, 6, 7, 9, 10

26 U.S.C. § 415(a) 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

29 U.S.C. § 1002(2) 5

29 U.S.C. § 1002(16)(B) 5

29 U.S.C. § 1002(21) 5

29 U.S.C. § 1002(35) 5

29 U.S.C. § 1109 1

29 U.S.C. § 1132 ..... 1, 2

29 U.S.C. § 1132(a)(3) ..... i, ii, 11, 12, 18

29 U.S.C. § 1132(e)(1) 1

Cited Authorities

	Page
29 U.S.C. § 1140	15
29 U.S.C. § 1144(a)	2
Rule:	
United States Supreme Court Rule 12.5	i

OPINIONS BELOW

Respondents concur with Petitioner's description (Petition at 1) of the opinions below, except add that the District Court issued an unreported Opinion and Order on September 3, 1996, reaffirming its entry of judgment for Respondents. The September 3, 1996 Opinion and Order is attached to the Conditional-Cross Petition filed by the Respondents at pages 1a-13a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (29 U.S.C. § 1132(e)(1)) and 28 U.S.C. § 1331. The Court of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291. This Court has jurisdiction to consider the Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Questions One through Three present issues arising out of ERISA Sections 409 and 502 (29 U.S.C. §§ 1109 and 1132).

ERISA Section 409 (29 U.S.C. § 1109) provides, in relevant part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan

> resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA Section 502 (29 U.S.C. § 1132) provides, in relevant part:

> (a) A civil action may be brought (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan* . . .

(emphasis added).

Question Four presents issues arising out of ERISA Section 514(a) (29 U.S.C. § 1144(a)), which provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and

subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

STATEMENT OF THE CASE

A. Introduction

Petitioners are former managers at U S WEST Communications, Inc. ("Communications"), a subsidiary of U S WEST, Inc. ("U S WEST"). They are former participants in the U S WEST Management Pension Plan (the "Plan") who voluntarily retired in 1990 pursuant to an early retirement incentive program under the Plan known as "5+5". The 5+5 program granted an extra 5 years of service credit and 5 years of age credit to eligible managers, and offered additional benefits to those who elected early retirement under the Plan during a "window period." The program was designed to induce a reduction in the management-level work force at U S WEST and Communications in a dignified manner, by dramatically increasing the pension benefits of those who elected the early retirement option. Managers retiring under 5+5 could elect to receive benefits in the form of an annuity or in an actuarially equivalent lump sum (i.e., the present value of the future annuity payments). Petitioners each elected to retire under 5+5, and chose the lump sum.

This dispute arose because the lump sum pension benefits Petitioners received under 5+5 (ranging from $275,000 to $530,000), combined with the other retirement benefits U S WEST provided, were so substantial that a

portion exceeded the distribution limitations imposed by Internal Revenue Code (26 U.S.C.; hereinafter, the "Code") Section 415 on "qualified" retirement plans, such as the Plan. Thus, although Petitioners were paid their entire benefit, the Code precluded them from "rolling over" the "excess" or "non-qualified" portion of their lump sum on a tax-deferred basis into an individual retirement account ("IRA"), and required them to pay income tax immediately on that portion. (Had Petitioners chosen annuities, taxes would have been deferred (not avoided) until distribution of annuity payments to them.) When the Plan administrator, the U S WEST, Inc. Employees' Benefit Committee ("EBC"), became aware of this impact on participants who (like Petitioners) elected lump sums, it reduced the discount rate for the "non-qualified" benefits, thus producing a substantially larger lump sum benefit than Petitioners would have otherwise received. The EBC believed, based on independent actuarial advice, that this adjustment would make Petitioners actuarially whole.[2]

Nevertheless, Petitioners made claims with the EBC and thereafter in court, seeking reimbursement for taxes they had to pay on the non-qualified or "excess" portion of their lump sums, and asking Respondents to pay their federal and state income taxes on the earnings on the excess benefits for the rest of their lives. Significantly, Petitioners did not seek to convert their lump sums back into annuities (thereby avoiding immediate taxation), or to rescind their retirements under the 5+5 program. Thus, Petitioners desired to retain

2. The Ninth Circuit did not disturb the District Court's factual findings that the actuary's advice was "reasonable under the circumstances and proper," and that using a lower discount rate "compensated for [Petitioners'] losses on the future income stream." 815 F. Supp. 1364, 1374 (D. Or. 1992).

the benefits of their 5+5 lump sums, but to have Respondents pay the taxes that had been accelerated due to Section 415 — even though Petitioners have never disputed that those taxes would ultimately have been their responsibility to pay as taxpayers.

B. Statement of Facts

1. *The Plan and Its Administration*

The Plan [3] is a tax-qualified defined benefit pension plan pursuant to Code Section 401(a) (26 U.S.C. § 401(a)) and ERISA Sections 3(2) and (35) (29 U.S.C. §§ 1002(2) and (35)). The requirements that a plan must meet to remain tax-qualified under Code Section 401(a) include ensuring that the benefits paid to individual participants do not exceed the limitations described in Section 415. Code § 415(a). Benefits paid under a plan that would exceed the Section 415 limitations are called "non-qualified" or "excess" benefits.

U S WEST is the "plan sponsor" of the Plan, as defined in ERISA Section 3(16)(B) (29 U.S.C. § 1002(16)(B)), and a "named fiduciary" as defined in ERISA Section 3(21) (29 U.S.C. § 1002(21)). Communications helps fund the Plan, provides ministerial help to the EBC and, at EBC direction, pays from corporate assets Plan benefits that exceed the Section 415 limitations. The EBC is the named fiduciary responsible for Plan operations and administration; for

3. The Plan, which covered only managers, merged with the U S WEST Pension Plan, which had covered non-managers, effective in 1993. The surviving entity, the U S WEST Pension Plan, has continued to feature materially the same operative terms, language, and administrative structure during the pendency of this case.

example, it decides claims, exercises discretion in interpreting Plan terms, ensures compliance with reporting and disclosure laws, and administers the excess benefit provision.

C. The Plan's Excess Benefit Provision and Its Administration

Paragraph 4.9 of the Plan provided:

> The portion of any pension or survivor annuity with respect to any participant in excess of the applicable [Code Section 415 limit] shall be paid by the Participating Company which last employed such participant, directly to the participant or beneficiary entitled thereto and shall be charged to its operating expense accounts when and as paid.

The EBC administers this provision as part of Plan administration. It determines the total benefits payable to a retiring participant and which of those benefits (if any) must, under Section 415 of the Code and paragraph 4.9 of the Plan, be paid as excess benefits. If excess benefits are payable, it decides which U S WEST company is to be charged and determines the amount to pay. The only roles played by the U S WEST companies with respect to excess benefit distributions are (1) to issue checks as directed by the EBC and (2) to report the excess benefit amounts to the State and Federal Governments for income tax purposes.

D. Disclosure of Possibility of Excess Benefit Distributions

The EBC issued a restated summary plan description ("SPD") for the Plan on July 1, 1989, and mailed it to all participants several months before the 5+5 offering. The SPD advised that Plan benefits could exceed legal limits on qualified distributions and that excess benefits could not be paid from the Plan's trust, but that the companies' intent (subject to change) was to pay any excess benefits from operating assets. This statement confirmed an earlier notice mailed to all participants in 1987.

E. Differences Between Qualified and Excess Benefit Distributions

The Section 415 limitations do not have any impact on a distribution that takes the form of an annuity, even if it includes excess as well as qualified benefits. Annuity payments are taxable as personal income when and as received. Qualified and excess *lump sum* benefits are both taxable, but they are given different tax treatment regarding whether the tax can be deferred. Under applicable tax law, excess lump sum benefits cannot be "rolled over" into IRAs and are subject to immediate taxation. Qualified benefits can be "rolled over" into an IRA or another qualified plan. If so rolled, the benefits are eligible for continued income tax deferral, rather than subject automatically to immediate taxation. Qualified benefits are then taxed when paid to the participant.

F. The 5+5 Plan Amendment

Before January 1, 1990, the Plan paid benefits (except those in *de minimis* amounts) in the form of an annuity only. On November 29, 1989, U S WEST's Board of Directors authorized the EBC to adopt an amendment that would add five years of age credit and five years of service credit for purposes of calculating Plan benefits for eligible employees. In addition, the amendment was to offer such employees an election in January 1990 to retire with numerous other pension enhancements and to elect to receive these benefits in lump sum form. The EBC adopted the "5+5" Amendment effective January 1, 1990, selecting an 8% discount rate for valuing the lump sum option. (The higher the discount rate, the lower the lump sum.)

Once made, elections to retire under 5+5 were irrevocable. All seven Petitioners elected in January 1990 to retire under 5+5, and chose lump sum benefits in lieu of an annuity.

G. Why the 5+5 Materials Did Not Specifically Address Excess Benefit Issues

The EBC was responsible for the content of all information provided to employees about 5+5. The EBC explained 5+5 primarily in a Bulletin supplementing the SPD that was mailed on or about December 18, 1989 to participants eligible for 5+5, including Petitioners. The Bulletin contained a brief, general summary of the lump sum distribution option, and described generally the rules most likely to affect the bulk of eligible participants, such as the ability to "roll over" all or part of a lump sum distribution on a tax deferred basis to an IRA. Appropriately, the Bulletin did not purport to give tax advice. Instead, it informed eligible participants that the tax issues

related to the election were complex, and advised them to review their SPD and to secure advice about the tax effects of 5+5 distributions from professionals.

The U S WEST Pension Staff, under the direction of the EBC, prepared the SPD and the Bulletin. Although some Pension Staff members were aware that some eligible employees might, if they elected 5+5, receive benefits that exceeded the Section 415 limits, the Bulletin did not address this issue, for several reasons.

First, because the purpose of the Bulletin was to supplement rather than restate the SPD, the Bulletin advised employees what was new in 5+5 and directed them to review the SPD – which described the effect of the Section 415 limitations — before making their 5+5 election. Second, the Pension Staff believed that, among some 6,000 eligible participants, the number whose benefits would exceed the limits was insignificant, that the amount of any excess benefits would also be insignificant, and that most employees electing 5+5 would apply for benefits in annuity form (making the differences between qualified and excess benefits irrelevant). This was balanced against the concern that raising the Section 415 issue (which would apply to few participants) would confuse all participants because of its complexity. Thus, the staff rationally concluded that expressly notifying eligible participants to seek tax advice from tax professionals, on balance, provided the most useful notice to all of the participants who received the Bulletin. Third, the Pension Staff sent participants, along with the Bulletin, Statements of Estimated Benefits that were expected to alert professional advisers to any possible Section 415 issue.

H. The EBC's Discovery Of and Action to Remedy the Excess Benefit Problem

In late January 1990, shortly before the election "window" period closed, the Plan's actuary reported that he had spoken with a participant whose 5+5 lump sum benefit would substantially exceed the Section 415 limits. This suggested that Section 415 issues might be more significant than the Pension Staff had anticipated when it sent the Bulletin. The actuary proposed lowering the discount rate on the excess benefits from 8% to 5.5% or 6% as a solution. According to the independent actuary, using a 5.5% to 6% discount rate — which would increase the amount of excess benefits — would offset the effect of immediate taxability of those benefits. The EBC accepted the actuary's advice, but decided to use a lower, 5.25% discount rate, thus increasing the benefits payable even more than the independent actuary had suggested. The District Court found (and the Ninth Circuit did not disturb this finding) that the EBC's action in this regard "compensated for the losses on the future income stream" caused by the acceleration of tax. 815 F. Supp. at 1374.

I. Notices to Participants About the Excess Benefit Problem

The Pension Staff, pursuant to EBC direction, notified the affected group of the amounts of their qualified and excess distributions and told them how the EBC had increased their benefits to offset the impact of Section 415. The benefits were then distributed.

A number of participants, including several of the Petitioners, called the Pension Staff to complain about their unanticipated immediate tax liability. Some pursued claims under the Plan's claims review procedure. Although the claimants asserted that the EBC's action (of lowering the discount rate) had not made them whole, none argued that the EBC acted unreasonably in adopting the 5.25% discount rate or that this rate did not produce an after-tax benefit that was actuarially equivalent to (or better than) the benefit they had expected to receive. The EBC had guidelines for allowing a participant to change a lump sum election to an annuity election (and thereby avoid immediate taxation), or to rescind the 5+5 election and return to work, but none of the 5+5 participants who received excess benefits asked for such relief. Instead, Petitioners demanded that the EBC and/or their employer pay immediately the federal and state income taxes they owed as taxpayers on the excess benefits, and also pay their taxes on the earnings thereon for the rest of their lives. The EBC denied these claims.

J. Course of Proceedings Below

Petitioners filed suit in state court alleging fraud and other state law claims. After Respondents removed the case to the District Court and remand was denied, Petitioners added a claim under ERISA Section 502(a)(3) for breach of fiduciary duty. In August, 1992, the District Court held that ERISA preempted the state law claims. 815 F. Supp. 1360 (D. Or. 1992). Following extensive discovery, the parties filed cross-motions for summary judgment based on a stipulated factual record. The District Court treated the motions as a bench trial on a stipulated record, 151 F.3d at 913 n.3; 815 F. Supp. at 1369, and proceeded to make findings of fact and conclusions of law and to enter judgment for Respondents. In December, 1992, the District

Court found that there had been no breach of fiduciary duty, and also held that Petitioners had not stated a claim for which relief was available under ERISA. 815 F. Supp. 1364 (D. Or. 1992). The Ninth Circuit reversed on the preemption issue, but affirmed the ruling that ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) did not afford individual relief to Petitioners. 58 F.3d 1361 (9th Cir. 1995). In the 1995 appeal, the Ninth Circuit did not consider whether Respondents breached any fiduciary duties under ERISA. 58 F.3d at 1363-64 n.1.

On remand, the parties again filed cross-motions for summary judgment on the same stipulated record, addressing the impact of this Court's intervening decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The District Court again entered judgment for Respondents. Opinion and Order (filed Sept. 3, 1996), App. 13a. It held that Petitioners' state law claims were preempted in light of *Varity*, and reaffirmed its 1992 finding that Respondents did not breach any fiduciary duty.

On Petitioners' second appeal, applying a *de novo* standard to the District Court's factual findings, the Ninth Circuit panel found that Respondents breached their fiduciary duty to Petitioners, but affirmed because ERISA preempted Petitioners' state law claims and did not allow Petitioners to recover any of the relief they sought. 151 F.3d 908 (9th Cir. 1998), *amended*, 179 F.3d 1252 (9th Cir. 1999). In the course of reversing the District Court on the merits, the 1998 panel (disregarding the District Court's factual findings) found that Respondents had deliberately misled Petitioners.[4] Two of

4. This finding was completely contradictory to an express finding of the District Court. As discussed fully in Respondents' Conditional Cross-Petition for Writ of *Certiorari* filed herewith, (Cont'd)

the members of the panel then wrote opinions commenting on the restrictions imposed by *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 262 (1993), on ERISA remedies and suggesting that the law should be changed — by Congress according to Judge Hawkins, or by the Ninth Circuit sitting *en banc* according to Judge Noonan. Judges Hawkins and Noonan then voted to rehear the case and requested extensive briefing by the parties on remedies issues — including the possible use of reformation (rewriting the Plan) and/or rescission (allowing Petitioners to return their lump sum benefits and awarding them back pay and either front pay or reinstatement). The parties filed letter briefs addressing these issues. Respondents also moved for leave to supplement the briefing on the issue of whether the panel had applied the wrong standard of review, and usurped the District Court's role by making findings of fact in conflict with the District Court's finding on the issue of fiduciary breach.

The panel ultimately rescinded the order granting rehearing, denied the motion for leave to supplement, denied rehearing, rejected the suggestion for rehearing *en banc*, and issued an amended order. In a footnote to the amended order, the panel stated that the requested award of back pay was denied because it was "inextricably linked" to Petitioners' demand for equitable rescission of their retirement agreements, and that rescission would not be equitable in

---

(Cont'd)
the panel had no power to set aside the District Court's findings of fact unless it determined that they were unsupported by the record (which was manifestly not the case). *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3109 (U.S. Nov. 1, 1999). This Court should not accept for review the issues raised by Petitioners unless it agrees also to review the standard of review applied by the panel.

this case given "the passage of time and the Petitioners' own admissions." Citing *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 77 (1995), however, the panel suggested that such relief may be appropriate in some other ERISA cases. Thus, the panel limited its conclusion that Petitioners are not entitled to any equitable relief to the particular facts of this case.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE AVAILABILITY OF BACK AND FRONT PAY AS A REMEDY FOR FIDUCIARY BREACH OR ON THE DENIAL OF SUCH A REMEDY ON THE FACTS PRESENTED

Petitioners correctly note that the Ninth Circuit in this case held that back pay without rescission was not "an equitable remedy in these circumstances." Petition at 9 and Appendix at 19 (July 15, 1999 Order of Ninth Circuit). There was in fact abundant support for the panel's conclusion that under the facts before it — specifically "the passing of time and the plaintiffs' own admissions" — back pay without rescission was not an equitable remedy "*in these circumstances*." Petition, Appendix at 19 (July 15, 1999 Order of Ninth Circuit at n.7) (emphasis added). Petitioners did not seek in 1990 (when reinstatement would have feasible) to rescind their retirements — *i.e.*, to give back their qualified and excess distributions and return to work. Instead, they asked Respondents to pay their taxes (even though paying the taxes was their responsibility as taxpayers and their dispute was only about the acceleration of the taxes). Indeed, they did not ask to change their 5+5

distribution from a lump sum to an annuity — a request that the EBC would have granted in 1990. Moreover, there has never been any factual showing that Petitioners' jobs even existed at any time after they retired under 5+5 — which was, after all, part of a company-wide reduction in force. Further, in their brief to the Ninth Circuit in the first appeal, Petitioners conceded that the passage of time made reinstatement unfeasible. In fact, *in their letter brief to the panel Petitioners stated that they did not want to rescind their retirements to the extent that required returning the distribution money*. Throughout this litigation Petitioners manifestly preferred the distributions they received — lump sum distributions that included enhanced excess benefits — to rescission. In such circumstances, rescission would not be equitable.

Petitioners make the astonishing assertion that the panel "specifically noted" that its decision conflicted with the Sixth Circuit's decision in *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995). The panel did no such thing. It noted the *Schwartz v. Gregori* decision, but did not describe that decision as being in "conflict" with its own decision in any way. Rather, as the panel correctly noted, the facts of *Schwartz* — a retaliatory discharge case brought under ERISA Section 510 (29 U.S.C. § 1140) — were dramatically different from those presented here.

There is no conflict among the Circuits on the availability of back and front pay as equitable relief for breaches of ERISA's fiduciary duties. Moreover, the panel decided this issue correctly on the facts before it. The Petition should be denied as to Question One.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE "REFORMATION" ISSUE, WHICH THE NINTH CIRCUIT CORRECTLY DECIDED

Petitioners' second issue relates to the "availability of restorative relief including reformation of the ERISA plan as a form of equitable relief." Petition at 15. As Petitioners note, the Ninth Circuit panel that decided this case requested further briefing on this issue before eventually affirming the judgment for Respondents. Petitioners complain that the panel affirmed without making any "specific comment" on this issue, and request this Court's "guidance" to "ensure uniform standards among the Circuits." Petition at 15.[5]

Again, Petitioners do not demonstrate the existence of any Circuit conflict on this issue, or that this issue presents an important question of law that this Court should decide. Moreover, *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) (Petition at 15), is not in conflict with the decision in this case. There, the court ordered that a summary plan description be modified to reflect the parties' actual agreement reached in collective bargaining as to the continuation of a retirement insurance program. Thus, the only situation the parties are aware of where plan reformation has been approved is where a plan document did not accurately reflect the intent of the parties. That is nothing like this case. There is no dispute about what the 5+5 program meant or said. What Petitioners requested in their letter briefs was not a "reformation" of the 5+5 Bulletin to make it

5. It is noteworthy that Petitioners did not seek this type of relief in their administrative claims, in their Complaint, or during seven years of litigation. They did not seek reformation until the panel asked about it in November, 1998.

comport with any agreement between them and Respondents. Rather, what they requested — and the panel rejected — was that the unambiguous terms of the Plan be rewritten to afford them a benefit to which they were never entitled under its terms. Neither Petitioners nor the panel have any quarrel with the District Court's finding that Petitioners "have been paid all the benefits provided under the 5+5 plan formula." 815 F. Supp. at 1371.

The law is not in conflict on this point. This Court has been very clear that the federal courts lack jurisdiction to "reform" the terms of employee benefit plans as a means of addressing purported fiduciary breaches, because creating, amending, and terminating plans is not a fiduciary but a settlor function. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). The Circuits have unanimously followed this Court's direction. *Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995), *cert. denied*, 517 U.S. 1004 (1996); *Waller v. Blue Cross*, 32 F.3d 1337 (9th Cir. 1994); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994); *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994), *cert. denied*, 513 U.S. 956 (1994); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

Thus, there is no conflict on Petitioners' second issue, which the panel decided correctly. The Petition should be denied as to Question Two.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE APPLICATION OF *MERTENS* TO ALLEGED FIDUCIARY BREACHES

Petitioners' third question apparently asks the Court to decide whether the carefully constructed legislative limitation on ERISA Section 502(a)(3) remedies to "appropriate equitable relief," as explained in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 262 (1993), should be applied differently where the defendants are ERISA fiduciaries rather than nonfiduciaries. Petitioners present no basis — other than their dissatisfaction with the panel's judgment against them — for this Court to reach this issue. As with Petitioners' other "issues," they do not demonstrate the existence of any conflict among the Circuits on this point, or show that a question of law exists of such national importance that this Court should resolve it. In fact, the courts uniformly have concluded (as did the Ninth Circuit panel here) that *Mertens* limits the relief available under ERISA to traditional equitable remedies regardless of the defendant's status as a fiduciary or nonfiduciary. *See, e.g., Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997); *Buckley Dement, Inc. v. Travelers Plan Admin.*, 39 F.3d 784 (7th Cir. 1994); *McLeod v. Oregon Lithoprint*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Slice v. Sons of Norway*, 34 F.3d 630 (8th Cir. 1994).

Thus, there is no conflict among the Circuits on this issue, and the Ninth Circuit decided it correctly. The Petition should be denied as to Question Three.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ERISA PREEMPTION ISSUE

Petitioners argue, finally, that because the Ninth Circuit's 1995 decision found no ERISA preemption of their claims, and the 1998 decision found their claims preempted, there is "confusion" on the issue of ERISA preemption, requiring this Court's guidance. Petition at 16-17. Again, Petitioners point to no conflicting decisions among the Circuits on the scope of ERISA preemption (in the context of this case) after this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Moreover, the difference between the Ninth Circuit's 1995 and 1998 decisions, about which Petitioners complain, is entirely consistent with the fact that this Court's decision in *Varity* was issued after the 1995 decision and properly guided the Ninth Circuit's 1998 decision.

Varity established the contours of "fiduciary" conduct and explained with clarity that conduct is fiduciary in nature if it involves the administration of an employee benefit plan. In *Varity*, petitioners claimed that their employer fraudulently told them that their employee benefits would be secure if they transferred their employment to a new subsidiary. This Court held that although the statements at issue were not ERISA-required disclosures and instead related to Varity's intent — as employer, and not as a fiduciary — to continue the plans, Varity was acting as both employer and fiduciary when it made those statements. The Court reasoned that conduct of an employer-administrator is fiduciary in nature if it is " 'appropriate' to carrying out an important plan purpose" such as providing detailed information to help beneficiaries "decide whether to remain with the plan."

As the Ninth Circuit quite properly recognized in its 1998 decision, *Varity*'s test for fiduciary conduct undermined the preemption analysis of the 1995 decision, requiring the District Court and the Ninth Circuit to find Petitioners' claims preempted. "Under the [Supreme] Court's reasoning in *Varity*, the tax consequences of [5+5] clearly 'relate to' plan administration because they are part of the overall mix of information relied upon by [Petitioners] in making their decisions to participate in [5+5]." 151 F.3d at 913 (Appendix to Petition at 7). Accordingly, the Ninth Circuit affirmed the District Court's finding that Petitioners' state law claims were preempted. That holding was correct, because U S WEST's alleged misrepresentation gave Petitioners information relating to their decision whether to accept enhanced retirement under 5+5. The conduct was plainly in furtherance of an "important plan purpose" and arose out of Plan administration.

Thus, there is no conflict on Petitioners' fourth issue, which the Ninth Circuit decided correctly. The Petition should be denied as to Question Four.

CONCLUSION

The Petition presents no real ground for this Court to expend its limited resources reviewing the issues Petitioners raise. There is no conflict among the Circuits on any of these issues. This case is limited to its facts and raises no issue of national importance to warrant a grant of *certiorari*. Moreover, the Ninth Circuit's ruling on the issues raised by the Petition was consistent with this Court's settled precedent. The Petition should be denied.

Respectfully submitted,

D. WARD KALLSTROM
Counsel of Record
GREGORY D. WELLONS
LILLICK & CHARLES LLP
Two Embarcadero Center
Suite 2700
San Francisco, CA 94108-2693
(415) 984-8200

DARREN E. NADEL
U S WEST LAW DEPARTMENT
1801 California Street
Suite 5100
Denver, CO 80202
(303) 672-2897

Attorneys for Respondents